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Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E. Street, NW
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RE: Comment on Notice of Proposed Rulemaking — "Internet Communications"

Dear Mr. Deutsch:

I am a co-founder of Direct Debate, Inc., a corporation in formation that advises media companies and non-profits on online platforms for candidate and opinion-leader debate, tools for voter education and participation, and revenue models.

Since May 2005, I have been a member of the Advisory Board of the Print Debate Center, Inc., a non-profit 501(c)(3) (pending), which conducted online debates involving eleven federal election candidates for the U.S. House of Representatives and Senate in the 2004 election cycle.

I offer the following comments in response to the Federal Election Commission's Notice of Proposed Rulemaking 2005-10, 70 Fed. Reg. 16,967 (April 4, 2005), "Internet Communications", and hereby request to testify at the public hearings scheduled June 28-29, 2005.

Comment

> "... It is unlawful ... for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner, to Congress are to be voted for ...." 2 U.S.C. 441(b).
>
> "[S]ection 441(b) seeks to prevent the use of resources amassed in the economic marketplace to gain an unfair advantage in the political marketplace."[1]

The Bipartisan Campaign Reform Act ("BCRA") includes a number of *anti-circumvention* amendments to the Federal Election Campaign Act of 1971 ("FECA"), reinforcing the objective of banning corporate and labor organization (and wealthy individuals') campaign expenditures and contributions thought to corrupt the political process.

In Shays v. FEC ("Shays"),[2] the Court held that regulations promulgated by the Commission under BCRA inappropriately exempt all Internet communications, opening significant opportunities for circumvention in "coordinated communications"[3] and "generic campaign activity".[4]

The Court ordered the Commission to rewrite its regulation implementing BCRA to include, at a minimum, "form[s] of general public political advertising" on the Internet in the definition of public communication.

However, the Court did not require that the Commission stop there. Indeed, it suggested that the FCC could under the statute interpret "public communication" to include Internet communication *generally* — treating the Internet on an equal footing to broadcast, cable, and satellite communications, newspapers and magazines. Indeed, the Court expressed concern with any definition that would exclude an entire class of communication.

Unfortunately, the Commission proposes an exceedingly narrow definition that, in effect, casts the Internet as a second-class medium and poses a risk of massive circumvention.

In the Proposed Rulemaking, the Commission notes that "broadcast, cable or satellite communications, newspapers, magazines and outdoor advertising facilities ... all ... typically charge fees to those who run political advertisements".

While true, this is not particularly relevant. In each case, all expression via these "traditional" media — *whether or not the expression is a paid political advertisement* — are included in the definition of "public communication". Nevertheless, free speech is protected.

[1] FEC Final Rules, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 FR 129 (July 6, 1995)

[2] 337 F.Supp.2d 28 (DC Cir. Sept. 28, 2004)

[3] "[E]xpenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign" Buckley v. Valeo, 424 U.S. 1, at 46 (1976).

[4] "[C]ampaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." 2 U.S.C. §431(21).

Thee Commission's proposal is an artificial construction that attempts to wall off the bulk of expression on the Internet from the application of campaign finance laws — deferring difficult decisions about whether to apply the exemptions for news. commentary and editorial content, avoiding examination of financial arrangements that might constitute coordinated communications, and leaving out of public view a major avenue for corrupting flows of nonfederal funds.

The Commission has made the placement of an "announcement" on a third party's web site, and the payment of fees, the organizing principles of its regulatory scheme. Does it matter whether fees are fixed, dependent on number of viewers of the ad, dependent on the number of viewers who "click through" an ad to content on the linked site?[5]

One of the distinctive features of the Internet is the speed and ease of following hyperlinks to other web sites. Any of a number of schemes is available to entice users to click through to linked web sites. Even if the ad copy of a banner is entirely neutral, from the point of view of federal election law, a linked site might embody 527 or corporate or labor organization funded expression, content that is coordinated with political campaigns. If an ad embeds a link, does the Commission consider the content of the *linked* web site irrelevant to an legal evaluation of the paid political ad?

Does it matter whether there is a clear separation between content and announcement? Is an announcement placed, if a press release is published for a fee? Is an announcement placed, if a blogger receives payment for editorial favor? Bloggers sometimes accept donations. Is it irrelevant whether a blogger accepts significant donations from entities that directly or indirectly influence the blogger's editorial views? Does this not establish a market for content intended to influence federal elections?

Does this not permit the content of a blog, effectively to "front" for the interests of 527 or corporate or labor organization interests, and effectively coordinated with political campaigns?

All without becoming subject to contributions or expenditure limitations, disclosure or disclaimer?

This Commission's narrow conception of political advertising — and the explicit example offered of "banner advertisements" — is reminiscent of newspaper advertising. If fees are integral, why not adopt the comparable rate obligations of 110.11(g) to these transactions, which state:

> "Comparable rate for campaign purposes. (1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes." 11 CFR 110.11(g)(1).

[5] Click-through payment makes advertising fees on the web highly dissimilar to fee-based ads in other media.

Existing regulations establish the principle of examining relationships between content providers and advertisers. Non-market transactions, and the payment of monies outright — certainly a non-market transaction — should be subject to Commission review, to determine if they constitute a route to circumvention.

Although the Commission proposes to extend the "press exemption"[6] to Internet expression in broad terms, the requests for comment are troubling. They betray a lack of an agreed-upon principle for defining the scope of the exemption. Again, the touchstone should be, whether the standards potentiate circumvention. It is troubling that, in the balance of the proposed regulations, the Commission effectively disarms itself of enforcement methods and standards that would enable a "press exemption" for Internet communication without circumvention.

Many if not most of the high-traffic bloggers no doubt meet standards of "bona fide" news, editorial opinion, etc. appropriate to the "press exemption", if the mainstream media broadly defined is the standard.[7]

Nevertheless, even if it is the case that a vast percentage of bloggers do not, the Commission need not "dumb down" the press exemption. Only a fraction of the online community need appeal to or rely upon the press exemption, if the Commission would do the following: adopt a de minimus rule for expenditures that on computer equipment and internet access charges, which will take the typical blogger out of the realm of campaign contribution/expenditure.

The proposed exceptions to the definitions of "contribution" and "expenditure" for individual or voluntary activity on the Internet attribute inappropriate significance to the provenance of computer equipment and the path to internet access.

Equally flawed is the proposed treatment of equipment and access available to employees from corporations or labor organizations in the course of their employment.

These proposals take an exceeding narrow, uninformed view of the fundamental economics of computer ownership and use, while imposing extraordinary burdens on citizen computer use and freedom of expression. In fact, this issue is almost entirely irrelevant to circumvention.

Corporate or labor organization provision of a computer and internet access is not analogous to use of a building or facility, either in financial or practical terms. What would be comparable is providing *a pen and paper*. A computer and internet access is about as fundamental now, and arguably about as cheap.

[6] "... The term 'expenditure' does not include ... any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate..." §431(9)(B)(i)

[7] "As of June 30, 2002, there are 8450 FM radio stations, 4811 AM radio stations, and 1712 full-power analog television stations operating in the United States, and that as of August 27, 2002, there are 516 digital television stations, 10,500 cable systems and several satellite providers", 67 FR 205, FCC Database on Electioneering Communications. There were 1480 daily newspapers in circulation in the United States in 2000, of which 223 had a daily circulation exceeding 50,000. http://www.stateofthenewsmedia.org

The standard should be the cost of the minimum equipment necessary, especially where higher order functions of computers in some hands confers no meaningful advantage. Blogging is in many respects a "retro" application. Text editing and publishing on the Internet. Yet, more compelling – and of more immediate political significance – than multimedia presentation.

Open source software, commodity systems, have brought the minimum cost of computers down significantly below $1000. Internet access represents a fractional cost of telephone service. The Internal Revenue Service attributes a depreciable life of five years to computer equipment.[8] A back of the envelope calculation, allocating $1000 over 5 years, suggests a value of just 55¢ per day, less than the price of a cup of coffee at Starbucks — hardly indicative of potential corruption in the political system. Again, the fact many users replace their computers more often does *not* confer any special advantage, elevating their speech above others. A MontBlanc fountain pen confers no benefit over a pencil, as an indicator of greater success in political expression.

Indeed, blog service companies have reduced the capital cost of establishing a blog effectively to zero.[9] A basic monthly "dial-up" internet connection, is entirely adequate to participate in the "blogosphere" — reading *and* posting blog content online.

As a blogger's viewership grows, the marginal costs of speech may rise — a fee based blogging platform may become a necessity to meet the web server related costs of a large readership — but so do opportunities for advertising revenue. This category of speech becomes a truly democratic instrument, when success in the marketplace of ideas effectively enables wide-reaching speech at no net cost to the speaker. Again, expression becomes democratizing, not corrupting.

Neither is this proposal likely to open the floodgates of independent expenditure that seeks to promote, support, affirm, oppose candidates for federal office; in fact, it is an anti-circumvention proposal.

As a student of the history of online debate between federal candidates, I wish pointedly to criticize the the proposed definition of "public communication" as it affects the dissemination, distribution or republication of campaign materials on the Internet, and to tie this to the omission of an important precedent from the Proposed Rulemaking.

In Advisory Opinion 1995-25, the Commission recognized that a website with significant safeguards to ensure the *nonpartisan* inclusion of content could publish detailed candidate-related information, including campaign materials, and conduct online debates between federal candidates, under the §431(9)(B)(ii) exemption from the definition of "expenditures" for "nonpartisan activity designed to encourage individuals to vote or to register to vote".

[8] Accounting practices may attribute less, three years on average, incorporating *corporate* conceptions of usable life, incorporating in part the rapid technological development of computers for corporate applications that have little or nothing to do with political expression on the Internet.

[9] Google's Blogger.com service provides a blogging platform entirely free to users. The fact some users purchase more advanced tools like Moveable Type — still at quite low cost — does not give their expression any meaningful advantage in the marketplace of ideas.

As proposed, it cheapens the value of those sites that are truly nonpartisan in mission and scope. That is the basis for DNet and its progeny. According to Advisory opinion in DNet, a web site that is nonpartisan and provides significant voter education, including interactions with candidates and head-to-head debate, is exempt from the definition of a "contribution" For sites that are truly nonpartisan, given wide latitude to provide candidates with a voice. Arguably, they have been given greater latitude than traditional media in the realm of online debate – relying on their nonpartisan character rather than the 103.10 regime.

Arguably, the Advisory Opinion greater leeway than any exemption available to traditional media in the rebroadcasting, and/or participation of content created by officeholders or candidates, including head-to-head debate. Agenda Document No. 04-82, Draft Notice of Disposition of Petition for Rulemaking, September 2004. Several major media organizations petitioned for rules stating explicitly that the sponsorship of a debate among candidates by a news organization, or related trade organization, is not an illegal corporate contribution or expenditure. FEC declined to issue Rulemaking, preferring to leave the §110.13 regime intact.

The Proposed Rulemaking does not recognized this important Advisory Opinion and, in effect, strips it of significance — to the extent that web sites are enabled to disseminate, distribute or republish campaign materials, whether or not both sides are represented.

Respectfully,

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